

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

FRED MILES,

Appellant,

v.

YAKIMA VALLEY COMMUNITY  
COLLEGE,

Respondent.

Case No. DISM-00-0055

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

**1.1 Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held on November 29, 2001, at Yakima Valley Community College in Yakima, Washington. WALTER T. HUBBARD, Chair, reviewed the record and participated in the decision in this matter. LEANA D. LAMB, Member, did not participate in the hearing or in the decision in this matter.

**1.2 Appearances.** Appellant did not appear and no representative appeared on his behalf. Patricia A. Thompson, Assistant Attorney General, represented Respondent Yakima Valley Community College.

**1.3 Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for personal use of college time and computer equipment and intimidating a co-worker.

**1.4 Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Johnson v.

1 Lower Columbia College, PAB No. D93-077 (1994); Rainwater v. School for the Deaf, PAB No.  
2 D89-004 (1989); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995)  
3 Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Ellison v. Brady, 924 F.  
4 2d 872, 880 (9th Cir., 1991).

## 6 **II. FINDINGS OF FACT**

7 2.1 Appellant Fred Miles was a Computer Maintenance Technician I and a permanent employee  
8 for Respondent Yakima Valley Community College (YVCC). Appellant and Respondent are  
9 subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358  
10 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on August 1, 2000.

11  
12 2.2 The first incident giving rise to this appeal occurred on June 2, 2000. On this day,  
13 Appellant's supervisor, Peggy Keller, observed Appellant using a personal portable high-capacity  
14 tape drive (zip drive) attached to a computer in the technology services area. Ms. Keller was  
15 concerned about what Appellant was doing and, over the weekend, she returned to campus for the  
16 purpose of examining the computer Appellant had been using. She discovered that the computer  
17 contained a program called "Napster" and that Appellant had been using it to download a large  
18 number of music files from the Internet. An investigation into the incident revealed that Appellant  
19 had attached his personal zip drive to the computer and spent approximately one and one-half hours  
20 copying music files to his zip drive.

21  
22 2.3 On July 12, 2000, while the investigation into the June 2 incident was in progress, a female  
23 co-worker, Jodi Lawson, observed Appellant sitting at another female co-worker's computer. A  
24 pornographic web page was on the screen. The web page showed very explicit positions of naked  
25 men. Appellant told Ms. Lawson that he was accessing the site to prove a point for his pre-

1 disciplinary meeting. Ms. Lawson was embarrassed and uncomfortable being subjected to the  
2 photo that Appellant had on the computer screen. An investigation into the incident revealed that  
3 Appellant accessed the web sites referred to as "sextracker.com" and "bigdicks.com."

4  
5 2.4 Several hours later, Appellant confronted Ms. Lawson and asked her not to report the  
6 incident to their supervisor. During the conversation, Appellant raised his voice in a  
7 confrontational manner, which caused Ms. Lawson to be uncomfortable.

8  
9 2.5 On July 13, 2000, another employee was trying to use the computer that Appellant normally  
10 used. Appellant's e-mail kept popping up on the screen. The employee asked Appellant's  
11 supervisor for assistance. As Ms. Keller assisted the employee, she noted an e-mail to Appellant  
12 from E-Bay. Subsequently, Appellant admitted that he used his college internet access and  
13 computer equipment to conduct business on E-Bay.

14  
15 2.6 Dr. Gary Tollefson is the Vice-President for Instruction and Student Services at YVCC. Ms.  
16 Keller told Dr. Tollefson about the June 20 incident. Dr. Tollefson asked Mark Rogstad, Director  
17 of Human Resources, to investigate the incident. Subsequently, Dr. Tollefson was made aware of  
18 the July 12 and 13 incidents. Dr. Tollefson conducted a pre-disciplinary hearing with Appellant and  
19 his representatives. Appellant admitted using college computer equipment to download music files  
20 and place them on his personal zip drive. Furthermore, Appellant did not deny visiting the  
21 pornographic sites on his co-worker's computer or telling another co-worker not to report the  
22 incident. Dr. Tollefson determined that Appellant was aware of YVCC's policies regarding  
23 computer usage, the policy addressing ethics and prohibiting the use of college resources for  
24 personal gain or private advantage, and the policy prohibiting sexual harassment. Dr. Tollefson  
25 concluded that Appellant engaged in misconduct and violated YVCC policies. Dr. Tollefson

1 forwarded the information regarding the incidents and his recommendation for termination to Dr.  
2 Linda Kaminski.

3  
4 2.7 Dr. Kaminski is the President and the appointing authority for YVCC. Dr. Kaminski and  
5 Dr. Tollefson discussed Appellant's alleged misconduct and reviewed the information provided by  
6 Mr. Rogstad. Dr. Kaminski determined that Appellant was guilty of all the allegations and that  
7 because he was insistent that he had done nothing wrong, his immediate dismissal was appropriate.  
8 By letter dated July 26, 2000, Dr. Kaminski notified Appellant of his immediate termination from  
9 employment with YVCC.

### 10 11 **III. ARGUMENTS OF THE PARTIES**

12 3.1 Respondent argues that Appellant engaged in misconduct including accessing YVCC  
13 computers and resources for personal use, placing pornography on a co-worker's computer, and  
14 intimidating another co-worker. Respondent contends that Appellant admitted his actions, and  
15 asserts that Appellant's actions constituted neglect of duty, willful violation of college policies,  
16 insubordination, mistreatment and abuse of fellow workers, sexual harassment, and rose to the level  
17 of gross misconduct. Therefore, Respondent asserts that dismissal was appropriate.

18  
19 3.2 Appellant did not provide a defense to the charges nor did he dispute the appropriateness of  
20 the disciplinary sanction before the Board.

### 21 22 **IV. CONCLUSIONS OF LAW**

23 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
24 herein.

1 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
2 the charges upon which the action was initiated by proving by a preponderance of the credible  
3 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
4 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
5 Corrections, PAB No. D82-084 (1983).

6  
7 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
8 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
9 of Social & Health Services, PAB No. D86-119 (1987).

10  
11 4.4 Willful violation of published employing agency or institution or Personnel Resources  
12 Board rules or regulations is established by facts showing the existence and publication of the rules  
13 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
14 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &  
15 Health Services, PAB No. D93-053 (1994).

16  
17 4.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior  
18 and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v.  
19 Dep't of Social and Health Services, PAB No. D94-025 (1995).

20  
21 4.6 Abuse of fellow employees is established when it is shown that the employee wrongfully or  
22 unreasonably treats another by word or deed. Johnson v. Lower Columbia College, PAB No. D93-  
23 077 (1994)

1 4.7 Conduct may constitute unlawful sexual harassment even when well-intentioned or when  
2 harassers do not realize that their conduct creates a hostile working environment. Ellison v. Brady,  
3 924 F. 2d 872, 880 (9th Cir., 1991).

4  
5 4.8 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
6 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

7  
8 4.9 Under the totality of the undisputed facts and circumstances presented here, Respondent has  
9 met its burden of proving the charges in the disciplinary letter and has proven that the disciplinary  
10 sanction of dismissal is appropriate. Therefore, the appeal should be denied.

11  
12 **V. ORDER**

13 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Fred Miles is denied.

14 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

15 WASHINGTON STATE PERSONNEL APPEALS BOARD

16  
17 \_\_\_\_\_  
18 Walter T. Hubbard, Chair

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21 Gerald L. Morgen, Vice Chair

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